STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 6, 2014
v	No. 309879 Kent Circuit Court
BOSS BAILEY, JR., Defendant-Appellant.	LC No. 11-009349-FH

Before: FITZGERALD, P.J., and MARKEY and BECKERING, JJ.

PER CURIAM.

A jury convicted defendant of larceny from a motor vehicle, MCL 750.356a(1), and resisting and obstructing a police officer, MCL 750.81d(1). The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to consecutive prison terms of 3 years and 6 months to 35 years for the larceny conviction and 3 years and 6 months to 15 years for the resisting and obstructing conviction. Defendant appeals as of right. We affirm.

On September 12, 2011, at approximately 2:45 a.m., Grand Rapids public safety officer Daniel Lobbezoo observed a grey Ford Taurus with its taillights on parked in the driveway of 954 Gladstone Street. Lobbezoo became suspicious, so he turned his vehicle around. At this point, Lobbezoo noticed that the car's taillights had been turned off and that the driver's side door of the car was open. Observing movement inside the car, Lobbezoo walked over to the car to investigate. When Lobbezoo was approximately ten feet from the car, a man, who was later identified as defendant, exited the vehicle. Lobbezoo turned on his flashlight and got a good look at defendant's face as defendant turned and looked over his shoulder. Defendant wore a bulky green coat and jeans and had long dreadlocks flowing from beneath the hood of his coat. Defendant walked toward the house carrying a briefcase, but began running toward the backyard when Lobbezoo, who was dressed in full uniform, told defendant that he wanted to talk to him. Lobbezoo announced "police" and instructed defendant to "get on the ground." Defendant ran into the backyard and jumped over the fence. Defendant ran west, across Gladstone Street, between houses and through backyards. Lobbezoo lost track of defendant amidst the shrubbery.

Lobbezoo contacted dispatch and requested back up assistance from the Grand Rapids Police Department. Lobbezoo described defendant as an African American male in his mid-twenties with dreadlocks and a green coat. Both the Grand Rapids Police Department and the Kent County Sheriff's Department responded to assist Lobbezoo. At some point, Lobbezoo was

informed that a suspect matching defendant's description had been apprehended. Lobbezoo went to the location of Iroquois Street and Fisk Street where defendant was sitting in the backseat of a police cruiser. Lobbezoo looked at defendant's face and "knew for a fact" that he was the perpetrator because of his facial structure and dreadlocks. Lobbezoo also noticed that both he and defendant were covered in the same foliage that appeared to have come from a shrub or bush.

An officer from the Grand Rapids Police Department searched defendant and found $41 in change in his pocket, cigarettes, keys, lighters, golf tees, and headphones. An iPod, iTrip, and camera were also found. One set of keys found on defendant's persons was later determined to have been for a vehicle stolen from a street close to where defendant was apprehended. A brown bag that had the word "Dewars" written on it was also found on defendant's person. Defendant continuously claimed that the camera and iPod were his, and told officers that he had been at his sister's home earlier that evening and that the keys belonged to his cousin.

Lobbezoo went back to 954 Gladstone Street at 3:00 a.m. and asked the resident of the home to look inside of his vehicle to determine if anything was missing. The victim testified that his briefcase, which contained a laptop and iPad, was missing, as well as a brown bag with a "Dewars" label on it that contained change, golf tees, and golf markers. After searching around the property, the victim and Lobbezoo located the briefcase containing the laptop and the iPad in the back yard. The victim also identified the "Dewars" bag and golf tees that were found on defendant's person as his property. The victim did not know defendant and had never given him permission to be in possession of his property.

Lobbezoo returned to his vehicle and read defendant his *Miranda*[1] rights before transporting him to the Kent County Correctional Facility. Defendant asserted that he did not want to speak to Lobbezoo. On the way to the police station, however, defendant began cursing, complaining, and demanding that his belongings be returned to him. After defendant continued to initiate conversation, Lobbezoo asked defendant general questions such as his address, whether he was on parole, and whether he had ever been arrested. Defendant was essentially uncooperative, but did not remain silent after refusing to answer some of Lobbezoo's questions. Defendant denied that Lobbezoo had yelled at him during the pursuit. At the police station, defendant aggressively stated "no" to every question, including whether he had any physical conditions.

On December 22, 2011, defense counsel requested that photographs that were allegedly taken by defendant on the night of his arrest be recovered from the camera found on defendant at the time of his arrest. Defense counsel expressed a belief that the photographs were exculpatory. In early January 2012 a detective with the Grand Rapids Police Department was able to recover 234 pictures and 10 videos that had been deleted from the camera's memory card. None of the photographs matched the description of the photographs that defendant had allegedly taken on the night of his arrest. Rather, the photographs depicted a Caucasian family. A parked vehicle could be seen in the background of one of the photographs. Detective Pete Gruzin of the East

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Grand Rapids Public Safety Department used the information from the vehicle's license plate to obtain a telephone number of a women who lived in Iowa. Gruzin described the photographs to the woman, who provided him with the telephone number of her daughter-in-law, Jill Teitsma, who lived in Grand Rapids. Gruzin contacted Teitsma, who came to the police station and identified the camera and photographs as belonging to her and her husband, Steve. Gruzin recognized Teitsma from the photographs as soon as she entered the police station. Teitsma informed Gruzin that Steve's iPod had been stolen and her description of the iPod matched the iPod that defendant had when he was arrested.

On February 14, 2012, the day trial was scheduled to commence, the prosecution moved to admit the testimony of Gruzin and Steve, the camera, the iPod, and the iTrip pursuant to MRE 404(b) in order to establish modus operandi. The prosecution argued that the Teitsmas lived one block away from Gladstone Street, where the larceny from the victim's vehicle occurred. The prosecutor alleged that the camera, iPod, and iTrip were allegedly stolen from the Teitsmas' vehicle sometime between the end of August and the beginning of September. Because defendant possessed the items on the night of his arrest, the prosecution argued that this established that defendant was in the habit of stealing property from vehicles in that area of town and that this, in turn, established defendant's identity as the man who committed the present larceny. The prosecutor further argued that despite the lack of pre-trial notice of his intent to use 404(b) evidence, good cause existed to admit the evidence because the late discovery was pursuant to defendant's request to recover the photographs.

Defense counsel argued that the evidence amounted to improper character evidence. He further argued that he had only been given notice of the prosecutor's intent to use the 404(b) evidence that morning, although he was aware that the deleted photographs had been recovered from the camera and that the owner of the camera had been located. When asked by the court what he would have done differently if he had been given notice, defense counsel responded, "I haven't even had time to think about what I would have done differently at this point in time." The trial court stated that it did not "see any apparent prejudice to the defense" and that it did not appear that anything would have been done differently if notice had been given. The court noted that the prosecution had told defendant about the camera as soon as they knew, and that it was defendant who "got this ball rolling essentially." The court ruled that the evidence was admissible as it tended "to establish a modus operandi or method, plan, scheme, or system in doing an act, namely breaking into automobiles in this end of town in order to steal valuables."

Steve Teitsma testified that sometime between August and "two or three weeks before September 28, 2011," a camera and an iPod with an iTrip attached to it were stolen from his minivan. He identified the camera and iPod recovered from defendant as belonging to him. He also identified the iTrip as being "the same color and brand" as the one that was missing from his van.[2]

[2] Subsequent to trial, it was learned that the iPod did not belong to Steve. In response, defendant moved for a new trial on the ground that the MRE 404(b) evidence was improperly admitted. Defense counsel argued that the evidence was unfairly prejudicial and prevented defendant's

Defendant testified that he purchased the iPod from Meijer in 2009, and that he had purchased the iTrip and kept it attached to the iPod. Although an iTrip is used to play music from an iPod onto a vehicle's radio, defendant admitted that he did not have a driver's license or a license plate for his vehicle at the time of his arrest.

Defendant testified that he moved into a halfway house in Waterford when he was released from the Michigan Department of Corrections on June 7, 2011. According to defendant, he purchased the camera on September 5, 2011, from "Miss Tracy's Party Store" while he was visiting family in Grand Rapids. He stated that "nine times out of ten" items sold at the party store were stolen. Defendant testified that he moved to Grand Rapids on September 8, 2011.

Defendant testified that on the evening of September 10 and into the morning of September 11, 2011, he attended a party. He began walking home, and as he was walking down Gladstone Street he observed a police car drive down the street and then turn around. Defendant then saw Lobbezoo get out of the vehicle and walk up a driveway. Soon thereafter, an unidentified man ran by and Lobbezoo ran after him. The unidentified man returned a short while later, threw something beneath a vehicle, and continued running. Defendant looked to see what the man had thrown under the vehicle and found the brown "Dewars" bag. Defendant put the bag, which had a key tangled in the drawstring of the bag, into his pocket and continued walking.

According to defendant, he is a talented artist who makes a living selling his art work. As he was walking down Alexander Street that night, he became "inspired" and began taking photographs of flowers and houses. He also decided to take photographs of police cruisers that were driving with their lights on and to title the photographs "Night Watch." Lobbezoo drove by him twice while he was taking photographs.[3] Defendant denied that he stole anything from the victim's vehicle or that he ran from Lobbezoo. He testified that his knee hurts "all the time" because of a series of accidents and asserted that he is not capable of running long distances or jumping over fences. He also indicated that he cannot see without his glasses and that he always

acquittal. The prosecutor argued that the evidence did not affect the outcome at trial. He pointed out that the camera that was in defendant's possession when he was arrested belonged to the Teitsmas. He further noted that Lobbezoo got a "good look" at defendant, who had unique hair, while he was stealing from the victim's vehicle. The trial court found that the fact that the camera belonged to the Teitsmas "indicate[d] that defendant did commit other crimes or other crimes contemporaneous with the one for which he was on trial, and that [MRE] 404(b) evidence was properly admitted. It further held that the "ambiguity surrounding the iPod [did] not, in any way, change the unambiguous testimony about the camera, which is clearly linked, as indicated, to the Teitsma vehicle." The trial court held that the prosecution's case was "extremely strong" and that it involved "positive witness identification by a police officer who caught [] defendant in the act of committing larceny . . . ." The trial court further noted that defendant is "a somewhat singular appearing gentleman. [Because] [h]e has sort of a Rastafarian Bob Marley look which is somewhat unusual in contemporary Grand Rapids and would certainly cause him to stand out." The trial court denied the motion for a new trial.

[3] These are the photographs that defense sought to recover.

wears them. Defendant admitted that he lied when he told the police that he had been at his sister's house earlier in the evening and that he lied when he told the police that the keys belonged to his cousin. He also admitted that he never told Lobbezoo or Gruzin about the unidentified man that he saw running away from Lobbezoo.

JoAnne Sherwood, a nurse practitioner for the Kent County Correctional Facility, testified that defendant complained about knee pain on September 19, 2011. She did not examine him at that time because defendant claimed that he had experienced knee pain since age 13 and he did not want to take medication for the pain. After defendant made another complaint, she examined him on October 18, 2011, and did not find an acute injury. Defendant's gait appeared adequate. Based on her evaluation, it seemed that defendant may have "crepitus," which is "essentially arthritis." According to Sherman, it is not unusual for individuals with crepitus to be able to perform physical activities.

I. DEFENDANT'S POST-ARREST SILENCE

Defendant argues that the prosecutor violated his Fifth and Fourteenth Amendment rights by using defendant's post-arrest, post-*Miranda* silence to impeach his testimony. He also argues that defense counsel's failure to object to the prosecution's use of defendant's silence constituted ineffective assistance of counsel.

The United States Constitution guarantees that no person "shall be compelled in any criminal case to be a witness against himself." US Const Am V. *Miranda*, 384 US 436, established "guidelines for law enforcement agencies and courts to follow" in order to protect the privilege against compelled self-incrimination during custodial police interrogations. *People v Shafier*, 483 Mich 205, 212; 768 NW2d 305 (2009). "[A] defendant's right to remain silent is protected by the Fourteenth Amendment which precludes the use of a defendant's silence following *Miranda* warnings to impeach an exculpatory story." *People v Alexander*, 188 Mich App 96, 102; 469 NW2d 10 (1991).

A defendant must unambiguously invoke the right to remain silent by affirmatively expressing the desire to remain silent or to not talk to the police. *Berghuis v Thompkins*, 560 US 370; 130 S Ct 2250, 2269; 176 L Ed 2d 1098 (2010). As a general rule, if a person remains silent after being arrested and given *Miranda* warnings, that silence may not be used as evidence against that person. *Shafier*, 483 Mich at 212-213, citing *Wainwright v Greenfield*, 474 US 284, 290-291; 106 S Ct 634, 88 L Ed 2d 623 (1986). This is the case because "there is no way to know after the fact whether it was due to the exercise of constitutional rights or to guilty knowledge." *People v McReavy*, 436 Mich 197, 218; 462 NW2d 1 (1990). Accordingly, where the record indicates that a defendant's silence is attributable to an invocation of his Fifth Amendment privilege or a reliance on *Miranda* warnings, use of his silence is error. *Id*. at 202.

In order to prevail on a claim of ineffective assistance of counsel, defendant must show that: (1) counsel's performance "fell below an objective standard of reasonableness" in light of prevailing professional norms at the time the representation took place, and (2) counsel's deficient performance prejudiced the defense such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

People v Carbin, 463 Mich 590, 600; 632 NW2d 884 (2001), quoting *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

A. Defense Counsel's Failure to Object to Testimony Elicited from Gruzin

Where silence follows *Miranda* warnings, the prosecution is not permitted to use post-warning silence to impeach a defendant's exculpatory trial testimony, *Shafier*, 483 Mich at 213, or as direct evidence of a defendant's guilt in its case-in-chief, *id*. at 213-214, unless the defendant claims "to have told the police the same version upon arrest," *People v Sutton*, 436 Mich 575, 592; 464 NW2d 276 (1990), quoting *Doyle v Ohio*, 426 US 610, 619 n 11; 93 S Ct 2240; 49 L Ed 2d 91 (1976).

In *Shafier*, 483 Mich at 215, the prosecutor made references to the defendant's post-arrest, post-*Miranda* silence during trial. The prosecutor "deliberately elicited testimony from the arresting officer regarding [the] defendant's" silence by asking if the defendant spoke to the officer after he was arrested and given his *Miranda* warnings. *Id*. at 215-216. The defendant testified that he had not committed the charged crime; during cross-examination, the prosecutor attempted to impeach his testimony by asking "You didn't say a single word about being arrested for criminal sexual conduct. Is that right?" *Id*. at 216-217. The defendant responded that he had not. *Id*. at 217. The prosecutor began his closing argument by highlighting the significance of the defendant's silence; he argued that the defendant was silent because "the defendant had been making his daughter do things that no person speaks about." *Id*. at 217. Our Supreme Court noted that "a reference to a defendant's post-arrest, post-*Miranda* silence" is generally a constitutional violation unless the reference was minimal. *Id*. at 217-218. It held, however, that "the prosecution clearly crossed [the] line by repeatedly using [the] defendant's post-arrest, post-*Miranda* silence as evidence in its case-in-chief and to impeach the defendant's testimony that he was innocent." *Id*. at 218. The Court held that the defendant's Fourteenth Amendment due process rights were violated by the prosecutor's repeated use of the defendant's silence to infer his guilt. *Id*. at 218-219. The Court reversed the defendant's conviction and remanded to the trial court "for further proceedings." *Id*. at 224.

Here, Gruzin testified at trial that he went to the jail to interview defendant. He testified that defendant was given his *Miranda* warnings. The prosecutor asked, "And at that time, he invoked his Fifth Amendment right and didn't wish to speak with you regarding any investigation, right?" Gruzin responded that defendant only stated "I have nothing to say to you." Accordingly, like in *Shafier*, the prosecution "deliberately elicited testimony" from Gruzin concerning defendant's post-arrest, post-*Miranda* silence. During defendant's testimony the prosecution asked defendant twice if he had shared his exculpatory story with Gruzin, to which defendant said "no." Also, during defendant's testimony, the prosecutor stated, "Now, how are we supposed to know where to go? You won't talk to Detective Gruzin at all." Accordingly, like in *Shafier*, the prosecutor used defendant's silence in an attempt to impeach his testimony that he was "innocent." During closing arguments, the prosecution referenced the fact that defendant failed to share his exculpatory testimony with Gruzin twice. The prosecutor submitted to the jury that this supported that defendant fabricated his testimony. Accordingly, like in *Shafier*, the prosecutor highlighted the significance of defendant's silence to infer his guilt in his closing argument.

As in *Shafier*, the prosecution clearly crossed the line by repeatedly using defendant's post-arrest, post-*Miranda* silence as evidence in his case-in-chief and to impeach the defendant's testimony that he was innocent. Accordingly, defendant's due process rights were violated by the prosecutor's repeated use of his silence to infer his guilt. See *Shafier*, 483 Mich at 218-219. It is well established that the prosecution is not permitted to use post-warning silence to impeach a defendant's exculpatory trial testimony, *id*. at 213, or as direct evidence of a defendant's guilt in the prosecutor's case-in-chief, *id*. at 213-214, where the defendant has not claimed "to have told the police the same version upon arrest." *Sutton*, 436 Mich at 592. Defense counsel's failure to object to the prosecution's repeated use of defendant's post-arrest, post-*Miranda* silence with respect to Gruzin was objectively unreasonable. See *Carbin*, 463 Mich at 600.

It is necessary to consider whether defense counsel's deficient performance prejudiced the defense such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. In *Shafier*, 483 Mich at 221-223, our Supreme Court considered whether improperly admitting evidence of the defendant's post-arrest, post-*Miranda* silence into evidence affected the defendant's substantial rights. The Court considered the following factors:

> (1) the extent of the prosecutor's comments, (2) the extent to which the prosecutor attempted to tie [the] defendant's silence to his guilt, and (3) the overall strength of the case against [the] defendant when considered in light of the degree to which the jury's assessment of the evidence might have been affected by the prosecutor's references to [the] defendant's silence. [*Id*. at 221.]

While the *Shafier* Court was analyzing whether the defendant was prejudiced by the improper evidence under the plain error doctrine, *id*. at 220-221, the Court's considerations regarding the effect that the improper admittance had on the outcome at trial is also relevant in determining whether the outcome of trial would have been different "but for" defense counsel's unprofessional error.

With respect to the first factor, the *Shafier* Court noted that "the more extensive a prosecutor's references to a defendant's post-arrest, post-*Miranda* silence, the more likely it is that the references had a prejudicial effect." *Id*. at 221-222. Here, the prosecution's references to defendant's silence when Gruzin attempted to question him were frequent throughout the second day of trial. The prosecutor elicited the testimony from Gruzin concerning defendant's silence, asked defendant twice on cross-examination about his failure to provide his exculpatory story to Gruzin, and made two references to defendant's failure to speak to Gruzin during his closing argument. Accordingly, because the prosecutor repeatedly referenced defendant's silence with respect to Gruzin, the references prejudiced the defense. See *id*.

With respect to the second factor, the *Shafier* Court also held that the references "to a defendant's post-arrest, post-*Miranda* silence are more likely to be prejudicial the more directly or explicitly the prosecutor uses the silence to challenge a defendant's credibility or show a defendant's guilt." *Id*. at 222. In so holding, the Court considered whether the references were inadvertent. *Id*. Here, the references were not inadvertent. Rather, the prosecutor specifically questioned Gruzin and defendant about defendant's invocation of his right to silence. The prosecutor directly stated the following to defendant during cross examination: "[H]ow are we

supposed to know where to go? You won't talk to detective Gruzin at all." More importantly, the prosecutor specifically referenced defendant's silence with respect to Gruzin twice in his closing argument. The prosecutor suggested that the fact that defendant failed to share the "story" with Gruzin was evidence that defendant had waited to hear what other witnesses stated in order to "fabricate a story that fit the evidence." The prosecutor also stated that "if he was telling the truth, he would have told . . . Detective Gruzin when he had the opportunity." Accordingly, the prosecutor used defendant's silence to directly challenge defendant's credibility and show his guilt, thus increasing the prejudicial effect. See *id*.

Finally, with respect to the third factor, the *Shafier* Court considered "the overall strength of the case against the defendant and the degree to which the jury's assessment of the evidence might have been affected by the prosecutor's references to a defendant's silence." *Shafier*, 483 Mich at 222-223. Here, Lobbezoo testified that he was ten feet away from defendant when he saw him removing property from the victim's vehicle. Defendant ran from him; and, thereafter, Lobbezoo gave dispatch a description of defendant. Defendant was seen in the neighborhood twice by Lobbezoo as he searched for the perpetrator, and defendant was apprehended by other officers a short period of time after the charged crimes occurred. Defendant matched Lobbezoo's description with the exception that he was wearing glasses at the time of arrest and was not wearing the green coat; he was also older than Lobbezoo initially described. However, Lobbezoo was "positive" that defendant was the perpetrator because of his dreadlocks, facial structure, and the fact that they were both covered in the same "foliage." The victim's "Dewars" bag, change, and golf tees were found in defendant's pocket. Although this Court does not make credibility determinations, *People v Wolfe*, 440 Mich 508, 514-515; 441 Mich 1201 (1992), amended 441 Mich 1201 (1992), defendant's attempt to explain how he came into possession of the victim's property was patently incredible. Accordingly, the unchallenged evidence establishes that the prosecution's case against defendant was very strong, and was not solely a credibility contest between police and defendant as defendant claims.

Moreover, as discussed *infra*, defendant's failure to provide Lobbezoo with his exculpatory statement was properly before the jury by way of other testimony because defendant specifically waived his right to silence while being transported to the jail; thus, the jury was already aware of defendant's failure to share his exculpatory story immediately after his arrest. Because the prosecution's case was strong and defendant's silence with respect to Lobbezoo was properly in the record, the jury's verdict was not likely a result of the prosecutor's references to defendant's silence with respect to Gruzin. Therefore, the final factor lessens the prejudicial effect on the defense. See *People v Borgne*, 483 Mich 178, 199-200; 768 NW2d 290 (2009) (holding that, because "the untainted evidence against [the] defendant show[ed] how strong the prosecution's case was," reversal was not necessary despite the prosecution's use of defendant's post-arrest, post-*Miranda* silence).

In sum, the record establishes that the prosecutor's injection of the silence issue was deliberate and was used to challenge defendant's credibility and show his guilt, thus increasing the prejudicial effect. However, because the jury's verdict was not likely a result of the prosecutor's references to defendant's silence with respect to Gruzin, defense counsel's failure to object to the prosecution's repeated use of defendant's silence did not prejudice defendant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of

the proceeding would have been different." See *Carbin*, 463 Mich at 600. Therefore, defendant was not denied effective assistance of counsel.

With respect to defendant's argument that defense counsel was ineffective for "compounding" the error by further questioning Gruzin about the circumstances surrounding defendant's refusal to speak with him, decisions regarding the questioning of witnesses are presumed to be trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). This Court does not "second guess counsel on matters of trial strategy, nor will [it] assess counsel's competence with the benefit of hindsight." *Id*. Here, defense counsel asked Gruzin on cross examination whether he expected that defendant would not want to speak to him when he attempted to question him at the jail. Gruzin stated that he expected that defendant *would* want to speak "because a majority of the people that" he spoke to wanted to give their side of the story. Defense counsel inquired "[m]ost people that are in jail awaiting trial are open about that when you want to go talk to them?" Gruzin responded that it was "rare" for people to "invoke their right." Defense counsel immediately began questioning Gruzin about another topic. It appears that defense counsel was seeking to elicit testimony that most defendants who are awaiting trial are not willing to speak to the police. While Gruzin did not testify as to that fact, the "fact that defense counsel's strategy may not have worked does not amount to ineffective assistance of counsel." *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Defense counsel's conduct did not fall outside the objective standard of reasonableness with respect to his questioning of Gruzin; thus, because defense counsel was not ineffective in this respect, reversal is not required. See *Carbin*, 463 Mich at 600.

B. Admission of the Videotape

With respect to defendant's argument that admission of the videotape of defendant while in the police car violated his constitutional rights, our Supreme Court has previously held that "[w]here the defendant has not maintained 'silence,' but has chosen to speak, the court has refused to endorse a formalistic view of silence." *McReavy*, 436 Mich at 218. A defendant who has waived his rights during questioning may not preclude evidence of omissions in his statements as evidence of protected silence. *Id.* at 211-212. A suspect will be found to have "elected to abandon the protections *Miranda* affords" when there is "evidence of a voluntary, knowing, and intelligent waiver." *People v Cheatham*, 453 Mich 1, 13; 551 NW2d 355 (1996). A statement is voluntary if it was "the product of free and deliberate choice rather than intimidation, coercion, or deception." *Id*. The waiver "must have been with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Id*.

Lobbezoo testified that defendant was read his *Miranda* warnings before he began transporting him to the jail. After, defendant expressed that he did not want to speak to Lobbezoo about the "incident," thus invoking his constitutional right to silence. *Berghuis*, 130 S Ct at 2269. However, on the way to the jail, defendant repeatedly spoke and initiated conversation with Lobbezoo. Defendant asked why he was being arrested, became angry when he was told he was being arrested for "larceny from an auto," accused the police officers of being racists, and cursed excessively. Defendant also declared, without being asked, that the camera and iPod belonged to him and demanded that they be returned. After defendant continued to speak, Lobbezoo asked defendant questions such as his address and whether he was on parole.

Defendant was essentially unresponsive. He either stated that he did not want to talk to Lobbezoo or was confrontational in his responses; for example, when Lobbezoo asked defendant his address, defendant responded "find out." When Lobbezoo asked if defendant heard him yell at him to stop running during the pursuit, defendant responded that Lobbezoo had not yelled at him. Defendant argues that, because the jury heard defendant refusing to answer Lobbezoo's questions, his Fifth and Fourteenth Amendment rights were violated because his "silence" was used against him as substantive evidence to imply his guilt. We disagree.

The record establishes that defendant initially invoked his right to silence in response to the *Miranda* warnings, but thereafter continuously spoke and initiated conversation with Lobbezoo. This Court has previously held that a "defendant cannot have it both ways—he cannot choose to speak and at the same time retain his right to remain silent." *People v Davis*, 191 Mich App 29, 36; 477 NW2d 438 (1991). Here, defendant "did not choose to remain silent. He chose to speak." See *id*. Accordingly, because there is no evidence on the record to support that defendant's initiation of conservation was not "voluntary, knowing, and intelligent," and defendant does not argue otherwise on appeal, defendant's initiation of conversation with Lobbezoo constituted an unequivocal waiver of his Fifth Amendment right to silence. See *Cheatham*, 453 Mich at 13.

Although, at times defendant informed Lobbezoo that he did not want to answer questions such as whether he was on parole and what his address was, defendant did not evidence an unequivocal invocation of his right to remain silent after he refused to answer these questions. Rather, immediately after the questions were asked, he resumed complaining about being arrested and demanding the return of the property that was recovered by the officers after his arrest. Defendant's failure to answer some of Lobbezoo's questions did not constitute an intent on behalf of defendant to again invoke the right to silence because defendant did not maintain silence after he refused to answer some of Lobbezoo's questions. See *McReavy*, 436 Mich at 211-212. Because the circumstances did not present any ambiguity that defendant waived his right to silence by initiating and engaging in conversation with Lobbezoo and selectively answering some questions and not others, offering the video into evidence did not violate defendant's constitutional rights. See *People v Rice (After Remand)*, 235 Mich App 429, 437; 597 NW2d 843 (1999) (holding that, where the defendant "made some statements, stopped talking, and hung his head down, and then again responded to questioning," the defendant waived his rights to silence). Even assuming that defendant's constitutional rights were violated as a result of the video being admitted into evidence, defendant is not entitled to reversal unless it is determined that the error affected the outcome of defendant's trial beyond a reasonable doubt. *People v Duncan*, 462 Mich 47, 51; 610 NW2d 551 (2000). Here, defendant alleges that the video affected the outcome at trial because the case was a credibility contest between defendant and Lobbezoo. Only portions of the video were played before the jury, and it is unclear from the record how much of the video was played before the jury. At one point, defense counsel objected to the jury seeing the video. The trial court overruled the objection, but the prosecution indicated that he would "skip" to a different portion of the video. It is unclear from the record how much of the video was "skipped." Even considering the video as a whole, the video did not negatively impact defendant's defense. Defendant did not make incriminating statements during the video; at worst, the video demonstrated that defendant was angry and uncooperative after his arrest, which defendant admitted during his testimony. Further, defendant's negative response to Lobbezoo's question concerning whether he heard defendant yell at him while he chased

defendant favored defendant's defense at trial that he was not the man who committed the charged crimes. Accordingly, any error in admitting the video into evidence was harmless beyond a reasonable doubt. *Duncan*, 462 Mich at 51.

C. Defendant's Failure to Provide Lobbezoo with his Exculpatory Story

Defendant argues that his constitutional rights were violated as a result of the prosecutor's questions and commentary on defendant's failure to provide Lobbezoo with his exculpatory story. "Absent an affirmative and unequivocal invocation of his right to remain silent following a post-arrest, post-*Miranda* statement to police, defendant cannot claim that his right to remain silent was infringed on by the prosecutor's questions and comments about his failure to assert his [exculpatory story] before trial." *Davis*, 191 Mich App at 36. As discussed *supra*, defendant waived his right to silence by choosing to speak while in the police cruiser with Lobbezoo. Therefore, defendant cannot now claim that "his right to remain silent was infringed on by the prosecutor's questions and comments about his failure to assert his [exculpatory story] before trial." Thus, the prosecutor's questions and commentary on defendant's failure to provide Lobbezoo with his exculpatory story did not amount to plain error. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Even assuming that defendant did not waive his Fifth Amendment right to silence and that the prosecution's questions and references to defendant's failure to provide his exculpatory statement to Lobbezoo amounted to plain error, the error did not affect defendant's substantial rights. See *Carines*, 460 Mich at 763-764. Assuming that the prosecutor's injection of the silence issue was deliberate and was used to challenge defendant's credibility and show his guilt, the jury's decision to convict defendant of the charged crimes was not likely a result of the prosecutor's references to defendant's silence with respect to Lobbezoo. Therefore, because defendant cannot establish that "the error affected the outcome of the lower court proceedings," reversal of defendant's convictions would not be proper. See *id*. at 763.

II. MRE 404(b) Evidence

Defendant argues that the trial court improperly admitted the testimony of Steve and Gruzin, as well as the iPod, iTrip, and camera, pursuant to MRE 404(b). He contends that the evidence was admitted without notice and over objection and that the evidence showed nothing more than propensity. Even assuming that the trial court abused its discretion by admitting the evidence, the error was harmless because it is not more probable than not that a different outcome would have resulted without the error. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Defendant denied that he committed the charged crimes and instead claimed an unidentified man committed them. However, the untainted evidence establishes that Lobbezoo saw defendant committing the larceny. Lobbezoo's description of defendant subsequently led to him being apprehended by other officers in the same general area shortly after the crime. Lobbezoo identified defendant less than an hour after the crimes were committed. He testified that he was "positive" that defendant was the perpetrator because of his dreadlocks, facial structure, and the fact that both he and defendant were covered in the same "foliage." Only defendant and one other person were observed in the area, which had "very low" foot traffic. Defendant also had the victim's stolen property in his pockets, which supports the presumption that defendant was the person who stole it. *People v Benevides*, 71 Mich App 168, 174-175; 247 NW2d 341 (1976). Furthermore, as previously discussed, evidence that defendant

did not share his exculpatory story with Lobbezoo immediately after his arrest was properly before the jury. And, although this Court does not make credibility determinations, we find, and the jury obviously agreed, that defendant's testimony was patently incredible. When considering the untainted evidence, it is not more probable than not that a different outcome would have resulted without the evidentiary error. *Lukity*, 460 Mich at 495-496.

III. MRE 609

Defendant argues that he was denied the effective assistance of counsel because defense counsel failed to object to admission of three of defendant's prior convictions that were admitted pursuant to MRE 609. He contends that admission of the convictions undermined defendant's testimony. Because defendant failed to move for a new trial or a *Ginther*[4] hearing, this Court's review is limited to mistakes apparent on the record. *People v Davis (On Rehearing)*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

In order to prevail on a claim of ineffective assistance of counsel, defendant must show that: (1) counsel's performance "fell below an objective standard of reasonableness" in light of prevailing professional norms at the time the representation took place, and (2) counsel's deficient performance prejudiced the defense such that "there is a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different." *Carbin*, 463 Mich at 460. Even assuming that defense counsel's failure to object to the prosecutor's use of the prior convictions and subsequent wavier of the issue was objectively unreasonable, we cannot conclude that defense counsel's deficient performance prejudiced the defense such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*.

Defendant's defense required the jury to believe that an unidentified man who looked like defendant in a "low" foot traffic area committed the charges crimes and that defendant simply picked up the victim's "Dewars" bag after the perpetrator discarded it. In order to acquit defendant of the charged crimes, the jury would have had to ignore the fact that Lobbezoo testified that he saw defendant committing the charged crimes. Furthermore, the evidence supported that Lobbezoo's description of defendant led to him being apprehended near where the crimes were committed less than an hour after the crimes occurred. Lobbezoo testified that he was positive that defendant was the perpetrator because of his dreadlocks, facial structure, and the fact that they were both covered in the same "foliage." Defendant also had the victim's property in his pocket. In light of this evidence, we cannot conclude that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

[4] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

IV. SENTENCE

Defendant argues that he has a right to have a jury determine that the facts used to support the trial court's scoring decision were proved beyond a reasonable doubt in accordance with *Alleyne v United States*, 133 S Ct 2151; ––– US ––––; 186 L Ed 2d 314 (2013) and other related United States Supreme Court cases. *Alleyne* held that because mandatory minimum sentences increase the penalty for a crime, any fact that increases the mandatory minimum is an "element" of the crime that must be submitted to a jury. *Id*. at 2160–2162. Judicial finding of such facts, the court asserted, constitutes a violation of the accused's Sixth Amendment rights. *Id*.

Our Court recently ruled that *Alleyne* does not apply to Michigan's indeterminate sentencing scheme, and the sentencing guidelines that effectuate it, because Michigan's indeterminate sentencing scheme involves a range of possible sentence time—not mandatory minimums. *People v Herron*, ––Mich App ––––; ––– NW2d –––– (2013) (Docket No. 309320, slip op at pp 6–7, decided December 12, 2013). Specifically, our Court noted that *Alleyne* distinguished:

> ... judicial fact-finding to establish a mandatory minimum floor of a sentencing range from the traditional wide discretion accorded judges to establish a minimum sentence within a range authorized by law as determined by a jury verdict or a defendant's plea. We hold that judicial fact-finding to score Michigan's guidelines falls within the "'wide discretion"'accorded a sentencing judge "'in the sources and types of evidence used to assist [the judge] in determining the kind and extent of punishment to be imposed within limits fixed by law.'" *Alleyne*, 570 US at ___ n 6; 133 S Ct at 2163 n 6, quoting *Williams v New York*, 337 US 241, 246; 69 S Ct 1079; 93 L Ed 1337 (1949). Michigan's sentencing guidelines are within the "broad sentencing discretion, informed by judicial factfinding, [which] does not violate the Sixth Amendment." *Alleyne*, 570 US at ___; 133 S Ct at 2163. [*Id*. at p 7.]

The *Herron* court further stressed that the statutes at issue in the case did:

> ... not provide for a *mandatory minimum* sentence on the basis of any judicial fact-finding. While judicial fact-finding in scoring the sentencing guidelines produces a recommended range for a minimum sentence of an indeterminate sentence, the maximum of which is set by law ... it does not establish a *mandatory minimum*; therefore, the exercise of judicial discretion guided by the sentencing guidelines scored through judicial fact-finding does not violate due process or the Sixth Amendment's right to a jury trial. *Alleyne*, 570 US at ___; 133 S Ct at 2163 n 6. [*Id*. at p 6 (emphasis original).]

This case is analogous to *Herron*. The statutes under which defendant was convicted (MCL 750.356a(1) and MCL 750.81d(1)) do not carry mandatory minimum sentences, and the scoring process did not create a mandatory minimum sentence on the basis of judicial fact-finding. Accordingly, we reject defendant's claim that the trial court's scoring of OV 13, 16, and 19 violated his Sixth Amendment rights.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey